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No. 01-

IN THE

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC.,
Petitioner,

v.

PAULA DARLENE HAMPTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that a 5-minute security stop, based upon probable cause, which occurred while Plaintiff was seeking to redeem a fragrance coupon of "negligible" value, violated the "make and enforce contracts" provision of 42 U.S.C. § 1981 and justified a compensatory and punitive award of $1.15 million.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, Plaintiff Demetria Cooper was also a party to the proceedings below.

Petitioner's official name is not Dillard's Department Stores, Inc. but rather Dillard's Inc. Pursuant to Rule 29.6 of the Rules of this Court, Dillard's Inc. states that it has no parent company, and no publicly held company owns more than 10% of the stock of Dillard's Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dillard Department Stores, Inc. ("Dillard's") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 247 F.3d 1091 (10th Cir. 2001) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a to 47a. The court of appeals' denial of rehearing and rehearing en banc is unpublished. Pet. App. 97a-98a. The opinion of the United States District Court for the District of Kansas granting Dillard's partial summary judgment is published at 985 F. Supp. 1055 (D. Kan. 1997). Pet. App. 86a-96a. The district court's opinion denying Dillard's

motion for judgment as a matter of law is published at 18 F. Supp. 2d 1256 (D. Kan. 1998). Pet. App. 48a-85a.

JURISDICTION

The court of appeals entered its decision on April 24, 2001. A timely petition for rehearing and rehearing en banc was denied on September 4, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 42, Section 1981 provides:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

STATEMENT OF THE CASE

This case involves a $1.15 million verdict against Dillard's arising from a brief investigative stop of an African-American customer by a Dillard's security guard. The stop was supported by probable cause, lasted no more than five minutes and was limited to comparing the contents of the Dillard's shopping bag that Plaintiff was carrying against the items on her store receipt. More to the point, the investigative stop did not prevent Plaintiff from completing her transaction with Dillard's, which she unilaterally abandoned because it "'wasn't a concern to her.'" Pet. App. 90a.

The court of appeals, however, concluded that Dillard's could be held liable for compensatory and punitive damages under the "make and enforce contracts" provision of 42 U.S.C. § 1981 ("Section 1981"). This remarkable holding derived from the seemingly inconsequential fact that the investigative stop occurred while Plaintiff was redeeming a fragrance coupon of nominal value. The panel majority acknowledged that if the stop had occurred only moments later, after Plaintiff had redeemed a fragrance sample, then there could be no liability under Section 1981. The panel concluded, however, that the brief delay occasioned by the investigative stop, the timing of which it characterized as "purely fortuitous," was legally sufficient to support liability under Section 1981.

The court of appeals' decision presents, in stark relief, an important issue regarding the proper scope of the "make and enforce contracts" provision of Section 1981 upon which the federal courts of appeals have adopted conflicting legal standards. In the Seventh, Fifth and Eighth Circuits, Plaintiff could not have prevailed because those courts have explained that the right to "make and enforce contracts" is violated only if the alleged conduct results in the "actual loss of a contract interest." Here, Plaintiff suffered no loss of any contractual interest. After the stop, Plaintiff had precisely the same

contractual right to redeem her fragrance coupon as she did before the stop. Her efforts to redeem the coupon, at most, were delayed for the duration of this brief stop.

In contrast, and in addition to the decision below, the Third and Sixth Circuits have adopted a more expansive view of the "make and enforce contracts" provision of Section 1981 that permits recovery even where, as here, a plaintiff has not been denied service, denied admittance or required to leave the store. The decision below thus squarely presents a mature conflict regarding the recurring issue of the proper legal bounds of the "make and enforce contracts" provision of Section 1981.

The Court should grant certiorari to resolve this decisional conflict.

A. Statutory Background.

Title 42, Section 1981 is a civil rights statute whose continuing evolution this Court has traced "on more than one occasion." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982). Section 1981 originated in § 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which was enacted by Congress shortly after ratification of the Thirteenth Amendment. *General Bldg. Contractors*, 458 U.S. at 384. Following ratification of the Fourteenth Amendment, Congress passed the Enforcement Act of 1870, ch. 114, 16 Stat. 140, which, at § 16, contained essentially the same language currently reflected in Section 1981(a). 458 U.S. at 385. That provision provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

This Court repeatedly has been called upon to resolve disputes regarding the legal scope of Section 1981, and this case presents the next logical step in the sequence. Initially, more than 100 years ago, this Court explained that the rights protected by Section 1981 were intended solely "to counteract

and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." *The Civil Rights Cases*, 109 U.S. 3, 16 (1883). Under this early view, Section 1981 could not "be impaired by the wrongful acts of individuals, unsupported by State authority." *Id.* at 17. Subsequently, the Court reversed course, concluding that Section 1981 "prohibits racial discrimination in the making and enforcement of *private* contracts." *Runyon* v. *McCrary*, 427 U.S. 160, 168 (1976) (emphasis added).

The Court, however, also has made clear that the scope of Section 1981 is not wholly unbounded and is subject to important legal limits. Thus, the Court has explained that Section 1981 is not violated by conduct that has a disproportionate impact on a particular group but "only by purposeful discrimination." *General Bldg. Contractors*, 458 U.S. at 391. Similarly, in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), the Court ruled that Section 1981 was not "a general proscription of racial discrimination in all aspects of contract relations," but instead "prohibit[ed] discrimination only in the making and enforcement of contracts." *Id.* at 176.

Against this background, and, in particular, in light of the Court's decision in *Patterson*, Congress amended Section 1981 through enactment of the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071. Congress redesignated the pre-existing language of Section 1981 as subsection (a), and added subsections (b) and (c). Subsection (b) defines "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 101, 105 Stat. at 1072. Subsection (c), in turn, provides that the "rights protected by [Section 1981] are protected against impairment by nongovernmental discrimination." *Id.* This Court has explained that the 1991 amendments establish a "new standard of conduct" for claims under Section 1981. *Rivers* v.

Roadway Express, Inc., 511 U.S. 298, 304 (1994). The *Rivers* Court, however, had no occasion to determine the outer bounds of Section 1981 because it held that the 1991 Amendments applied prospectively only. *Id.*

This case presents the recurring issue of the proper scope of this "new standard of conduct" under Section 1981 with respect to the relationship between a retail business and its customers.

B. District Court Proceedings.

1. This cases arises from a shopping trip involving Plaintiff Paula Darlene Hampton ("Plaintiff" or "Hampton") and her niece Demetria Cooper, both of whom are African-American. On April 5, 1996, Hampton and Cooper, together with four children, were shopping at the children's department at a Dillard's store in Overland Park, Kansas. Pet. App. 3a. Hampton had shopped at Dillard's numerous times without incident. *Id.* at 47a. On this occasion, however, a plain-clothed Dillard's security guard, Tom Wilson, observed that Cooper appeared to be looking around "as if to check to see if she was being watched" and noticed that she had a rolled-up cloth item in her hand. *Id.* at 4a. Wilson asked another employee, Pam Fitzgerel, to monitor Hampton and Cooper while they were trying clothes on Cooper's infant son. *Id.* Fitzgerel saw that Cooper had a rolled-up cloth item under her jacket and reported this to Wilson, stating she was "positive" of what she had seen. *Id.*

Hampton left the fitting room and purchased clothing for Cooper's son. Pet. App. 4a. The cashier gave both Hampton and Cooper coupons for men's cologne samples redeemable at no cost at the fragrance counter. *Id.*; see also *id.* at 89a. Hampton and Cooper proceeded to the fragrance counter, which was located at the exit where the Dillard's store opens into a shopping mall. *Id.* at 4a.

Wilson approached the group and told Hampton that Cooper had been "observed placing something in her coat."

Pet. App. 4a. Wilson asked to look inside the Dillard's shopping bag that Hampton was carrying, he checked the items in the shopping bag against her receipt, and determined that the items matched. *Id.* at 4a-5a. As the district court explained, Wilson never touched Hampton, never used any racial epithets or made any derogatory remarks to or about her or Cooper. *Id.* at 89a. Nevertheless, during the encounter, Hampton became upset and said that she did not appreciate being accused of shoplifting. *Id.* at 5a. Hampton asked for Wilson's name and the location of the customer service counter. *Id.* She then proceeded directly to the customer service counter. The entire encounter between Wilson and Hampton lasted no more than five minutes. *Id.*

2. After the incident, Hampton and Cooper filed suit, alleging violations of Section 1981 and a tort claim for false imprisonment under Kansas law. The district court granted, in part, Dillard's motion for summary judgment, rejecting Plaintiffs' argument that "freedom from racially discriminatory security practices is a benefit or privilege of a merchant's implied contractual offer to let them shop in its store." Pet. App. 92a. The court reasoned that Plaintiffs' theory, if accepted, "'would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts.'" *Id.* (quoting *Lewis* v. *J.C. Penney Co.*, 948 F. Supp. 367, 371-72 (D. Del. 1996)).

As to the state law count, the court concluded that Wilson had probable cause to detain the women and did so in a reasonable manner. Pet. App. 95a-96a.[1] The court explained

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[1] The court thus held that Dillard's was entitled to summary judgment on this claim under the statutory defense for merchants contained in Kansas Statutes Annotated Section 21-3424, which provides:

> Any merchant, or merchant's agent or employee, who has probable cause to believe that a person has actual possession of and has wrongfully taken, or is about to wrongfully take merchandise from a mercantile establishment, may detain such person on the premises or

that on the issue of probable cause there was no evidence that "seriously calls into question either Wilson's credibility or that of Fitzgerel—who independently observed Cooper in the fitting room." *Id.* at 96a.

The district court, however, allowed Hampton's Section 1981 claim to go forward because Hampton had received a coupon for a fragrance sample at the time of her purchase and was approached by the security guard while she was attempting to redeem the coupon. Pet. App. 93a-94a. At trial, the jury determined that the fragrance sample was a "benefit" of the contractual relationship between Hampton and Dillard's and that Dillard's had interfered with her redemption of the coupon based upon the encounter between Wilson and Hampton. Thereafter, the jury was asked whether Hampton's race was a "motivating factor in defendant's conduct," that is, whether "defendant acted, at least in part, because of plaintiff's race." *Id.* at 25a. "[D]efendant's conduct," in turn, was described as "defendant's surveillance, detention and search of [Hampton's] belongings." *Id.* at 24a, 25a.

The undisputed evidence at trial reflected that Hampton was never required to leave the store, was never denied service and was not prevented from redeeming her fragrance coupon. Pet. App. 5a, 89a. Indeed, after the encounter with Wilson, Hampton returned to get the name and telephone number of the employee working at the fragrance counter, but did not attempt to redeem the fragrance coupon because "'it wasn't a concern to her.'" *Id.* at 90a. That was not surprising because "the value of the free cologne sample was negligible." *Id.* at 81a.

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in the immediate vicinity thereof, in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession.

Kan. Stat. Ann. § 21-3424(c).

Nevertheless, the jury returned a verdict of $56,000 in compensatory damages and $1.1 million in punitive damages. On Dillard's motion for a new trial, the district court concluded that the compensatory award was justified not by the loss of the coupon but by the emotional injury of being falsely accused of shoplifting. Similarly, the district court sustained the punitive award, reasoning that the case did not involve "mere economic damages" but "personal injury and emotional damages." Pet. App. 85a.

C. The Court Of Appeals' Decision.

A divided panel of the Tenth Circuit affirmed, with Senior Judge Anderson dissenting. The court ruled that there was sufficient evidence for a jury to conclude that Dillard's violated the "make and enforce contracts" provision of Section 1981 based upon Wilson's security stop, which occurred while Hampton was seeking to redeem her fragrance sample. Pet. App. 16a. The panel majority agreed with the dissent that the timing of Wilson's interruption of Hampton as she was redeeming the fragrance coupon was "'purely fortuitous.'" *Id.* at 16a n.3. This was because "Wilson's testimony d[id] not suggest he had the subjective intent to prevent the redemption of the coupon." *Id.* at 16a & n.3. According to the panel majority, however, "Wilson's inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action." *Id.* at 16a n.3. To support this conclusion, the court responded that "§ 1981 protects enjoyment of the benefits of a contract from *any* impairment." *Id.* at 16a-17a. The majority ruled that subjective intent to interfere with the making or enforcement of a contract was not required to establish a Section 1981 violation. *Id.* Rather, the court interpreted Section 1981 to require only a general intent "to discriminate on the basis of race" where "that discrimination interfered with the making or enforcing of a contract." *Id.* at 17a.

Finally, the majority affirmed the compensatory and punitive awards. It acknowledged that "any economic

damage that resulted from the store's intentional interference with the redemption of the fragrance sample was negligible." Pet. App. 32a. Even though Section 1981, by its terms, applies only to conduct that purposefully prevents the making or enforcing of a contract, the court of appeals upheld the compensatory award based upon Hampton's testimony regarding her emotional suffering caused by being accused of shoplifting in front of her family. *Id.* at 32a-33a. The court also affirmed the $1.1 million punitive award on the basis of the testimony not about Dillard's denial of the right to "make and enforce contracts," but instead upon testimony regarding Dillard's training of its security staff, its surveillance policies, reports regarding observations of African-American customers and Dillard's arrest reports. *Id.* at 34a, 35a.

In dissent, Senior Judge Anderson emphasized that there was no evidence that Dillard's sought to interfere with Hampton's contract because "[n]othing in Ms. Hampton's or Ms. Cooper's testimony remotely suggests that Mr. Wilson's conduct towards them indicated an intention to prevent either plaintiff from redeeming the fragrance coupons." Pet. App. 45a. Judge Anderson explained that the evidence reflected that, at most, any interference with "Ms. Hampton's redemption of her fragrance coupon was *purely fortuitous*." *Id.* (emphasis added). The dissent further explained that there was no evidence that "either Mr. Wilson's or plaintiffs' conduct, or Ms. Hampton's damages . . . would have been different in any way had Ms. Hampton already received her fragrance sample." *Id.* at 46a. Specifically, Judge Anderson explained that "all the evidence indicates that it was the wrongful accusation of shoplifting, not the denial of her free fragrance sample, which caused Ms. Hampton's alleged injuries." *Id.* Judge Anderson emphasized, however, that Section 1981 "does not provide a remedy for the wrongful accusation of shoplifting, absent some interference with a contract benefit." *Id.*

Dillard's petitioned for rehearing and rehearing en banc. The same panel majority voted to deny rehearing, while Senior Judge Anderson would have granted the petition. Pet. App. 97a. A majority of the active judges of the court of appeals denied the petition for rehearing en banc. See 10th Cir. R. 35.5. Chief Judge Tacha, Judge Kelly, and Judge Brorby voted to grant rehearing en banc. Pet. App. 97a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the court of appeals' decision poses an important issue regarding the legal scope of the "make and enforce contracts" provision of Section 1981 that has generated conflicting positions among the courts of appeals. That issue presents a recurring and outcome determinative question in cases filed throughout the country in which plaintiffs have sought relief based on allegations that the services that they received from retailers were inferior in some way to the services allegedly afforded to white customers. This case squarely presents that conflict. Although the court below concluded that even a brief delay occasioned by an investigative stop was sufficient to support relief, Plaintiff could not have prevailed under the legal standards adopted by the courts of appeals in other circuits that employ more demanding rules for determining whether there was been a denial of a contractual right that would support liability under Section 1981. The case thus warrants review so the Court can resolve this conflict and provide one uniform nationwide standard to govern claims under the "make and enforce contracts" provision of Section 1981.

There is a profound conflict among the circuits regarding the legal standards for determining whether conduct violates the "make and enforce contracts" provision of Section 1981. On the one hand, the courts of appeals for the Seventh, Fifth and Eighth Circuits employ a bright-line standard that requires plaintiffs to establish that they suffered an "actual loss of a contractual interest," which, in the retail context,

requires that they prove that they were denied admittance, denied service, or required to leave the store. This approach, in turn, has been adopted by numerous district courts throughout the country. In contrast, the Third and Sixth Circuits, as well as the court of appeals in this case, have employed a far more lenient standard that authorizes recovery under Section 1981 even when a plaintiff has not been denied service, but instead has alleged that there was a delay in receiving service or that the service actually received was inferior or in some way different from that received by white customers. Those decisions too have been adopted by a number of district courts that have embraced this more expansive view of Section 1981.

This case squarely presents this conflict for resolution because under the standards adopted by the Seventh, Fifth and Eighth Circuits, Plaintiff could not have prevailed under Section 1981 based upon the brief delay associated with the investigative stop in this case. Simply put, Plaintiff's contractual right to redeem her fragrance coupon was precisely the same after the stop as it was before. The court of appeals' efforts to reconcile its holding with that of conflicting court of appeals' decisions simply do not withstand scrutiny because, at bottom, Plaintiff could not have recovered under Section 1981 if her case had been filed in the Seventh, Fifth or Eighth Circuits because her contractual rights both before and after the security stop were the same.

There can be no question that proper resolution of this conflict regarding the meaning of one of the nation's oldest civil rights statutes is an issue of surpassing importance. For over 100 years, the Court has resolved conflicts regarding the proper scope of Section 1981. Adoption of one uniform national standard is necessary to ensure that consumers will know the scope of their rights under Section 1981. Conversely, a uniform standard will alleviate unnecessary uncertainty and allow retailers better to assess the scope of their obligations so that they can establish company-wide

protocols that are not subject to differing standards depending upon the location of the specific store in question. Liability under Section 1981 should be governed by substance, not geography. Finally, resolution of the proper scope of Section 1981 is important to securing a proper balance between State and federal law with respect to the obligations owed by retailers to their customers.

ARGUMENT

THE DECISION BELOW PRESENTS A CONFLICT AMONG THE COURTS OF APPEALS AS TO THE PROPER SCOPE OF THE "MAKE AND ENFORCE CONTRACTS" PROVISION OF 42 U.S.C. § 1981, AN ISSUE OF SURPASSING NATIONAL IMPORTANCE.

A. The Courts Of Appeals Have Adopted Conflicting Standards For Assessing Whether Conduct Violates The "Make And Enforce Contracts" Provision Of Section 1981.

1. At least three courts of appeals have adopted a bright-line standard for determining whether conduct violates the "make and enforce contracts" provision of Section 1981. Under those standards, Plaintiff could not have prevailed under Section 1981 because she failed to establish that the conduct about which she complained resulted in the "actual loss of a contract interest."

In the Seventh Circuit, to state a cause of action under Section 1981 in a retail setting, a customer categorically must show that he was "denied . . . admittance" or "service," or required "to leave the store." *Morris* v. *Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996). In *Morris*, the customers argued that the store discouraged or dissuaded them from purchasing time stamps by calling uniformed police officers to stop them and ask them questions in the store. *Id.* The *Morris* Court explained that plaintiffs failed to state a

violation of Section 1981 because they were not denied admittance or service or required to leave the store. *Id.* The Seventh Circuit ruled that a cause of action under Section 1981 must allege and establish "the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *Id.* at 414-15.

Similarly, in *Bagley* v. *Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000), the Seventh Circuit held that even where a customer is refused service by one employee, that is not a basis for a Section 1981 action if the customer could have been served by other employees. *Id.* at 522. Although one employee had been outwardly hostile to Bagley and had refused to wait on him, the Court concluded that there had been no Section 1981 violation because the evidence reflected that defendant nevertheless "would have sold Bagley a phone." *Id.* The court of appeals reasoned that because Bagley cut off his opportunity to make the purchase by leaving the store, the defendant had not denied him the right to make and enforce contracts under Section 1981. *Id.* at 521-22.

In *Bellows* v. *Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997), the Fifth Circuit held that a violation of Section 1981 requires a plaintiff to show that the defendant's conduct had "modified, changed or terminated" the contractual relationship. *Id.* at 275. Applying that standard and relying upon the Seventh Circuit's decision in *Morris*, the court of appeals reversed a jury verdict against defendant because the evidence was inadequate to prove that defendant "did in fact interfere with the contract." *Id.* (emphasis omitted). Specifically, the Fifth Circuit held that Section 1981 had not been violated because plaintiff failed to demonstrate how its contractual rights were "in any way changed, modified, altered, terminated, or otherwise affected by any of [defendant's] actions." *Id.* at 275.

Finally, and most recently, the Eighth Circuit's decision in *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th

Cir. 2001), also reflects similar principles. There, the court of appeals affirmed the grant of summary judgment, holding that there was no Section 1981 liability where a customer was stopped for shoplifting after making a purchase and his purchase was confiscated by the store. *Id.* at 853. The court explained that "Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred," rather, "a plaintiff must point to some contractual relationship in order to bring a claim under Section 1981." *Id.* at 855. Because the customer had completed his purchase and received the merchandise from the clerk, the Eighth Circuit reasoned that "neither party owed the other any duty under the retail-sale contract," and therefore there could be no liability under Section 1981. *Id.* at 854.

District courts outside these circuits also have applied standards consistent with those adopted by the Seventh, Fifth and Eighth Circuits. Thus, in *Garrett* v. *Tandy Corp.*, 142 F. Supp. 2d 117 (D. Me. 2001), the court explained that the proper focus in Section 1981 was on "restrictions on the ability to contract . . . not general mistreatment related to race," and therefore Section 1981 "require[d] that a complaint 'allege the actual loss of a contract interest.'" *Id.* at 119 & n.3 (quoting *Morris*, 89 F.3d at 414-15).[2] Further, district courts have rejected Section 1981 claims predicated upon allegations "of delayed service" because such allegations "do not rise to the level of interference with a contract sufficient to grant relief under § 1981." *Jeffrey* v. *Home Depot U.S.A., Inc.*, 90

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[2] *See also Rogers* v. *Elliott*, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) ("Virtually all federal courts that have analyzed Section 1981 claims in the retail merchandise context have required the plaintiff to show that he was actually prevented from making a purchase.") (citing cases); *Jackson* v. *Tyler's Dad's Place, Inc.*, 850 F. Supp. 53, 56 (D.D.C. 1994) (granting summary judgment where plaintiffs were "invited to dine in the bar area but refused"), *aff'd*, 107 F.3d 9[illegible] (D.C. Cir. 1996) (mem.).

F. Supp. 2d 1066, 1069 (S.D. Cal. 2000).[3] Finally, district courts have rejected the notion that an accusation of shoplifting, even if false, is sufficient to state a claim under Section 1981 because "such a theory would come close to nullifying the contract requirement of section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts." *Lewis* v. *J.C. Penney Co.*, 948 F. Supp. 367, 371-72 (D. Del. 1996).[4]

These cases show not only that Plaintiff's claim would have been dismissed in many courts, but also that these issues arise in the retail setting every day and thus a decision by this Court is profoundly warranted.

2. In contrast to the decisions above, the Third and Sixth Circuits, like the court of appeals below, have adopted a more sweeping view of the "make and enforce contracts" provision of Section 1981.

For instance, the Third Circuit has held that a Section 1981 claim can stand even where there has been no showing of a denial of service to the customer. See *Hall* v. *Pennsylvania State Police*, 570 F.2d 86, 88 (3d Cir. 1978). In *Hall*, an African-American bank customer brought a claim under Section 1981 because his bank allegedly had a policy of photographing African-American customers, but not white customers, when they entered the bank. *Id.* at 92. The district

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[3] *See also Bobbitt by Bobbitt* v. *Rage Inc.*, 19 F. Supp. 2d 512, 518 (W.D.N.C. 1998) ("'[T]he mere fact of slow service in a fast-food restaurant does not . . . rise to the level of violating one's civil rights'"); *cf. Robertson* v. *Burger King, Inc.*, 848 F. Supp. 78, 81 (E.D. La. 1994) (delay in service does not support claim under Section 1981).

[4] *See also Garrett v. Tandy Corp.*, 142 F. Supp. 2d 117, 119 (D. Me. 2001) (noting that accusation of shoplifting failed to state claim under Section 1981 because that conduct did not "interfere with contract . . . rights" of plaintiff); *Rogers*, 135 F. Supp. 2d at 1313, 1315 (holding that conduct, including accusation of shoplifting, failed to support Section 1981 because it occurred after transaction had been completed).

court concluded that plaintiff could not bring a Section 1981 claim because he "did not allege deprivation of any contractually related right because of race." *Id.* at 89. The Third Circuit reversed, holding that "Section 1981 obligates commercial enterprises to extend the same treatment to contractual customers 'as is enjoyed by white citizens.'" *Id.* at 92.

Similarly, in *Christian* v. *Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001), the Sixth Circuit reversed the grant of judgment as a matter of law to a defendant as to a Section 1981 claim at the close of the customers' case. *Id.* at 872. There, Christian, who was African-American, and Edens, who was white, were shopping together at a Wal-Mart store. *Id.* at 864. The women were stopped when a store employee suspected that Christian had been shoplifting. *Id.* at 865. The employee subsequently saw the missing item returned to the shelf and called a cashier to tell the police not to come to the store. *Id.* at 866. The police nevertheless arrived and, upon the store manager's recommendation, asked both women to leave the store. *Id.*

In reversing, the Sixth Circuit established a sweeping standard for Section 1981 claims in the commercial establishment context. Relying upon *Callwood* v. *Dave & Buster's, Inc.*, 98 F. Supp. 2d 694 (D. Md. 2000), the Sixth Circuit held that a plaintiff could prevail under Section 1981 not only where he was "deprived of services" while "similarly situated persons outside the protected class were not" but also where a plaintiff actually "received services in a *markedly hostile manner* and in a manner which a reasonable person would find objectively discriminatory." *Christian*, 252 F.3d at 872 (emphasis added). Thus, under the Sixth Circuit's standard, a plaintiff can bring a Section 1981 claim *even if* plaintiff is not

denied service, but where the manner in which such service is provided is "markedly hostile."[5]

Further, in this case, the Tenth Circuit ruled that a brief investigative stop was sufficient to state a claim under Section 1981 because it occurred while Plaintiff was redeeming a fragrance coupon. Pet. App. 16a. In the majority's view, Plaintiff stated a cause of action under Section 1981 because there was evidence from which the jury could conclude that there had been an "interruption of an ongoing transaction" by the Dillard's security guard. *Id.* at 16a n.3. In context, this holding is breathtaking in its scope. Here, it was undisputed that the investigative stop lasted at most five minutes, that Hampton was not prevented from redeeming her fragrance coupon after the investigative stop, and that Hampton acknowledged that she returned to the fragrance counter after the investigative stop but did not seek to redeem her fragrance coupon because "'it wasn't a concern to her.'" *Id.* at 90a.[6]

B. The Decision Below Squarely Implicates This Conflict Among The Courts Of Appeals.

The ruling of the court of appeals in this case squarely implicates this substantial conflict among the circuits as to the

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[5] Other courts have adopted the *Callwood* court's expansive reading of Section 1981. *See, e.g., Bethea* v. *Michael's Family Rest. & Diner*, No. 00-6216, 2001 WL 722566, at *3 (E.D. Pa. June 26, 2001) (relying upon *Callwood* to hold that allegations of delay in service were sufficient to state claim under Section 1981).

[6] Consistent with these decisions, district courts also have concluded that plaintiffs can recover under Section 1981 even where they have not been denied service. *See, e.g., Buchanan* v. *Consolidated Stores Corp.*, 125 F. Supp. 2d 730, 735 (D. Md. 2001) ("[t]he fact that purchases were made is not dispositive" because "Courts have allowed § 1981 claims to proceed even though a plaintiff was allowed to complete his or her sales transaction or contract with the defendant"); *Williams* v. *Cloverleaf Farms Dairy, Inc.*, 78 F. Supp. 2d 479, 485 (D. Md. 1999) (allowing section 1981 claim on the basis of "delay in completing the transaction" coupled with "alleged racial attack").

legal standards for determining whether conduct violates the "make and enforce contracts" provision of Section 1981.

1. Under the standards adopted in *Morris*, *Bagley*, *Bellows*, and *Youngblood*, Hampton could not have recovered because the temporary delay resulting from the investigative stop did not violate Hampton's right to "make and enforce contracts" under Section 1981. Under *Morris*, Hampton could not have recovered because she failed to show "the actual loss of a contract interest." See *Morris*, 89 F.3d at 414. That is, both before and after the investigative stop, Hampton retained the contractual right to redeem her coupon at the fragrance counter. Put another way, as the Fifth Circuit has ruled, there was no evidence that Plaintiff's contractual relationship "was in any way changed, modified, altered, terminated, or otherwise affected by any of [Dillard's] actions." *Bellows*, 118 F.3d at 275.

That conclusion is confirmed by analyzing the bases for the jury's compensatory and punitive damages awards against Dillard's. As explained by the panel majority, "any economic damage that resulted from the store's intentional interference with the redemption of the fragrance sample was negligible." Pet. App. 32a. Rather, the compensatory award was predicated on Hampton's emotional distress arising from an accusation, made in front of the children who were with her in the store, that Plaintiff (or her niece Cooper) had been shoplifting. Of course, that accusation and those emotional injuries have nothing to do with Plaintiff's rights under Section 1981 to "make or enforce" the fragrance coupon that she received as a benefit of her purchase of clothing from Dillard's. Nothing "in this case would have been different had Mr. Wilson intercepted plaintiffs before, during or after they redeemed their fragrance coupons" because it was the "wrongful accusation of shoplifting, not the denial of her free

fragrance sample, which caused Ms. Hampton's alleged injuries." *Id.* at 46a (Anderson, S.J., dissenting).[7]

Further, under *Bagley*, Hampton could not have recovered based solely upon the delay resulting from the investigative stop because she was not prevented from redeeming her fragrance coupon. 220 F.3d at 521-22. Although, as in *Bagley*, Plaintiff undoubtedly took offense when a Dillard's employee asked to search the Dillard's shopping bag that Hampton was carrying, there is no question that Hampton could have redeemed her coupon at the fragrance counter after the brief stop. Indeed, even the panel majority acknowledged that "Wilson's testimony does not suggest he had the subjective intent to prevent the redemption of the coupon." Pet. App. 16a. Rather, the "purely fortuitous" timing of the interruption merely delayed the redemption of the fragrance coupon in the same way that the hostile treatment by the employee in *Bagley* delayed the plaintiff's effort to purchase a phone. 220 F.3d at 522. But, in *Bagley*, the Court held that a plaintiff cannot recover if he "opted not to contract with [defendant]" by "leaving the store" and abandoning the opportunity to complete the contractual transaction. *Id.* at 521-22. In the same way, after filing a complaint with the store's service department, Hampton returned to the fragrance counter, but never attempted to redeem the fragrance coupon because "'it wasn't a concern to her.'" Pet. App. 90a.

Finally, under the standards adopted in *Youngblood*, where the plaintiff's purchase was confiscated by defendant, Hampton could not recover because the delay in redeeming the fragrance coupon was undoubtedly far less intrusive than

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[7] The same is true of the punitive award that the panel majority affirmed based upon evidence "about the coding and close surveillance of African-American shoppers," Pet. App. 35a, and not with any "nominal" economic injury arising from the delay in redeeming the fragrance coupon.

the conduct in *Youngblood*. See 266 F.3d at 854. Instead, Plaintiff was subjected to a brief delay occasioned by an investigative stop that was supported by probable cause and conducted in an objectively reasonable manner. Pet. App. 95a-96a. Hampton retained the benefit of the clothes that she purchased as well as the contractual right to redeem the fragrance coupon after the investigative stop.[8]

2. The court of appeals' implicit suggestion that its decision is consistent with the standards adopted by other courts of appeals such as *Morris* does not survive scrutiny. Pet. App. 16a n.3. In responding to Judge Anderson's showing that no evidence supported the conclusion that Wilson had "the subjective intent to prevent the redemption of the coupon," *id.* at 16a, the majority purported to rely upon the Seventh Circuit's decision in *Morris*. Specifically, the majority argued that cases such as *Morris* support the view that "inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action." *Id.* 16a n.3 (citing *Morris* for the proposition that Section 1981 claim fails where plaintiffs were stopped "after making purchase" and thus "'were neither denied neither admittance nor service, nor were they asked to leave the store'").

But the panel misinterprets *Morris*. There, the Seventh Circuit's decision was not based upon "inopportune timing" (from the perspective of plaintiffs), but on the threshold

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[8] The *Youngblood* court purported to distinguish the decision in this case by arguing that, here, the fragrance coupon extended the benefits of the purchase contract. 266 F.3d at 854. But that distinction is illusory. Under the Eighth Circuit's holding in *Youngblood*, Dillard's could have confiscated Hampton's purchases and her coupon because Hampton had already completed her purchase. Applying the holding in *Youngblood*, Hampton would not be able to bring a Section 1981 claim if her purchases and coupon had been confiscated after being stopped on a suspicion of shoplifting, although she could bring a conversion claim for the value of the confiscated property.

failure by plaintiffs who "did not attempt to make any further purchases" and therefore could not allege "the actual loss of a contract interest." *Morris*, 89 F.3d at 414. So too here, the "purely fortuitous" timing of the investigative stop also should have been irrelevant to whether Hampton was deprived of her contractual right to redeem the free fragrance coupon. Her decision to abandon any contractual rights that she had with respect to the free fragrance sample after the investigative stop is fatal to her ability to demonstrate that she suffered an "actual loss of a contract interest" under *Morris*.

In sum, there is a hopeless conflict among the courts of appeals regarding the legal standards that govern whether conduct violates the "make and enforce contracts" component of Section 1981, and only this Court can resolve that intolerable situation.

C. The Proper Application Of Section 1981 Presents An Important And Recurring Issue Of Federal Law.

This Court has upon repeated occasions grappled with cases raising questions regarding the proper scope of the nation's civil rights laws in general, and the scope of Section 1981 in particular.[9] The Court's close attention to cases involving the

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[9] *See, e.g.*, *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (holding that 1991 Amendments to Section 1981 apply prospectively only); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989) (holding that Section 1983 provides "the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor"); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172, 176 (1989) (reaffirming that Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts" but is not "a general proscription of racial discrimination in all aspects of contract relations"); *Saint Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that Section 1981 applies to discrimination based upon "ancestry or ethnic characteristics"); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 391 (1982) (holding that Section 1981 "can be violated only by purposeful discrimination"); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295, 296 (1976) (holding that Section

interpretation of these statutes reflects, in no small measure, the importance of their proper and uniform construction. Here there can be no doubt of the need for or importance of an authoritative ruling resolving the conflict regarding the proper legal standard for determining whether conduct violates the "make and enforce" contracts provision of Section 1981. This is particularly so in light of the inconsistent decisions of the courts of appeals since Congress' 1991 Amendments to Section 1981. Indeed, apart from ruling that the 1991 Amendments usher in a "new standard of conduct" and therefore applied prospectively only, this Court has had no occasion to delineate the legal bounds of Section 1981 since Congress' amendments. See *Rivers*, 511 U.S. at 304.

Second, the competing interests at issue include not only the consistent enforcement of federal civil rights laws, but also the regulation of contractual rights and the ability of retailers to carry on their day-to-day business. As reflected in Part A, numerous district courts and courts of appeals have been presented with allegations concerning the scope of the "make and enforce contracts" provision of Section 1981 in cases brought by retail customers. Because of the ubiquitous nature of retail transactions, and because of the magnitude of jury verdicts such as the one in this case, there can be no doubt that the filing of such cases will continue. Due to the conflicting interpretations of the scope of Section 1981's protections and obligations, however, neither consumers nor retailers are subject to uniform rights and obligations throughout the country. Moreover, because large retailers operate stores in many parts of the country, they are subjected to needless uncertainty, are unable to enforce consistent policies and instead must implement a patchwork of

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1981 prohibited "discrimination in the making or enforcement of contracts against . . . any race" including "white[s]"); *Runyon* v. *McCrary*, 427 U.S. 160, 168 (1976) (ruling that Section 1981 applied to private contracts); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (stating that Section 1981 applies to private employment contracts).

procedures and protocols to satisfy what should be a single national standard.

Third, resolution of this conflict is important because the proper scope of the "make and enforce contracts" provision of Section 1981 implicates important questions regarding the division of authority between Federal and State government. Indeed, the expansive interpretation of the scope of Section 1981 caused the court of appeals effectively to deny the protections afforded to retailers under State law. Pet. App. 19a & n.4. Here, the court of appeals acknowledged that the stop complied with State law requirements—namely Kansas' statutory merchants defense—but concluded that such compliance was irrelevant to the Section 1981 issue. *Id.* at 19a n.4. To be sure, Dillard's compliance with the probable cause safe-harbor under State law may not necessarily be determinative of Plaintiff's Section 1981 claim, *id.*, but State law certainly is not irrelevant to determining the proper scope of Section 1981. See *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 479 (1977) (explaining that, unless Congress plainly directs, the Court is "reluctant to federalize" matters traditionally covered by state common law). Moreover, restraint in construing a federal statute is especially appropriate where, as here, a more expansive interpretation of a congressional enactment would approach the constitutional limits of congressional authority. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979).

Finally, as shown above, this case directly implicates the conflict among the courts of appeals and thus presents an appropriate vehicle for resolving the conflict and announcing a single uniform standard for determining whether conduct violates the "make and enforce contracts" provision of Section 1981. See *supra* at 13-22. The Court simply should not allow recovery under Section 1981 to depend solely on the fortuity of geography.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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